STATE OF MICHIGAN

COURT OF APPEALS

PAUL MARINO and LINDA MARINO,

Plaintiffs,

v

GRAYHAVEN ESTATES LIMITED, L.L.C., PULTE HOMES OF MICHIGAN CORPORATION and PULTE CORPORATION,

Defendants/Cross-Defendant - Appellants,

and

GRAYHAVEN-LENOX LIMITED DIVIDEND HOUSING ASSOCIATION and GRAYHAVEN ESTATES DEVELOPMENT COMPANY,

Defendants/Cross-Plaintiffs-Appellees,

and

CHARLES BROWN,

Defendant.

UNPUBLISHED
October 4, 2007

No. 271118
Wayne Circuit Court
LC No. 98-813922-CH

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendants/cross-defendants, Grayhaven Estates Limited, L.L.C., Pulte Homes Of Michigan Corporation and Pulte Corporation,[1] appeal as of right from the order denying their

[1] For clarity's sake, we will refer to these cross-defendants as "Pulte."

motion to strike claims for attorney fees and costs and ordering Pulte to indemnify defendants/cross-plaintiffs, Grayhaven-Lenox Limited Dividend Housing Association and Grayhaven Estates Development Company,[2] and pay attorney fees and costs in the amount of $70,868.83. We vacate the trial court's order and remand for further proceedings consistent with this opinion.

Pulte first argues that the trial court erred in granting Grayhavens' motion for summary disposition and awarding attorney fees because no agreement existed between the parties. For the reasons explained below, we conclude that, although the agreement entered into in 2001 does not provide indemnification for the Grayhavens, there is a genuine issue of material fact regarding whether the Grayhavens are entitled to payment of attorney fees based on the existence of a 1998 oral agreement, wherein Pulte allegedly agreed to assume the defense of the Grayhavens.

This Court reviews de novo a trial court's grant of a motion for summary disposition. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West, supra* at 183. Similarly, "[t]he interpretation of a contract is . . . a question of law this Court reviews de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact." *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003) (citations omitted).

In *Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004), we set forth these sound principles of contract law:

> The main goal of contract interpretation generally is to enforce the parties' intent. *Mahnick v Bell Co*, 256 Mich App 154, 158-159; 662 NW2d 830 (2003). But when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001), and parol evidence is inadmissible to prove a different intent, *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). An unambiguous contract must be enforced according to its terms. *Mahnick, supra* at 159, 662 NW2d 830. The judiciary may not rewrite contracts on the basis of discerned 'reasonable expectations' of the parties because to do so 'is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the

[2] Likewise, for ease of clarity, we will refer to cross-plaintiffs as the "Grayhavens."

> agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy.' *Wilkie, supra* at 51, 664 NW2d 776.

An indemnity provision generally requires the indemnitor to make an indemnitee whole after the indemnitee has sustained a loss. See *Langley v Harris Corp*, 413 Mich 592, 596; 321 NW2d 662 (1982); *Wausau Underwriters Insurance Co v Ajax Paving Industries, Inc*, 256 Mich App 646, 653; 671 NW2d 539 (2003). Indemnity contracts are, of course, construed in the same manner as contracts generally. *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005).

The indemnification clause contained in the 2001 Agreement states:

> [Charles] Brown and Grayhaven Island release, discharge and acquit Pulte [Corp], Blake, Grayhaven Estates and Shorepointe and each of them and each of their respective officers, directors, predecessors, successors, assigns, shareholders, subsidiaries, affiliates, attorneys, agents, representatives and employees, of all claims arising prior to or subsequent to the date of this Agreement relating to their interests and involvement in Grayhaven Estates, Shorepointe and the Condominium Association and claims ancillary thereto, except for their failure to perform any of their obligations as set forth herein. *Pulte [Corp], Blake, Grayhaven Estates and Shorepointe release, discharge and acquit Brown and Grayhaven Island and each of them, and each of their respective officers, directors, successors and assigns, predecessors, shareholders, subsidiaries, affiliates, attorneys, agents, representatives and employees of all claims arising prior to or subsequent to the date of this Agreement relating to their interests and involvement in Grayhaven Estates*, Shorepointe and the Condominium Association and claims ancillary thereto, except for their failure to perform any of their obligations as set forth herein. *Grayhaven Estates and Shorepointe hereby, jointly and severally, indemnify and hold Brown and Grayhaven Island harmless from and against any claims of third parties brought in connection with the operation of either Grayhaven Estates or Shorepointe***,** including, but not limited to, claims arising out of or related to the loan guaranty discussed in Paragraph 9 hereof. [Emphasis added.]

We conclude that the indemnification clause is unambiguous in that it only applies to Brown and not to the Grayhavens. The first two sentences of the indemnification clause release the parties to the 2001 Agreement, including Brown and Pulte, and their "officers, directors, predecessors, successors, assigns, shareholders, subsidiaries, affiliates, attorneys, agents, representatives and employees" from claims against the other. Clearly, Grayhaven Lenox and Grayhaven Development may be properly considered as an affiliate of Brown, given their relationships. However, the exclusion of the term "affiliates" in the last sentence of the indemnification clause indicates that the parties did not intend for the Brown affiliates to be indemnified from actions by third parties. Generally, the express mention of one thing implies the exclusion of another. *Wayne County v Wayne County Retirement Comm*, 267 Mich App 230, 248; 704 NW2d 117 (2005) (explaining the general contract interpretation principle of "*expressio unius est exclusio alterius*"). Thus, the mention of Brown in the last sentence without mentioning the term "affiliates" implies the exclusion of both Grayhaven Lenox and Grayhaven Development. *Id*. This construction accords with the principle of contract construction that a

contract should be construed so that all of its provisions are enforced, *MSI Constr Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995), as well as with the principle that we enforce the language used by the parties. *Burkhardt, supra*. Accordingly, the Grayhavens were not entitled to indemnification from Pulte under the 2001 Agreement.

However, we conclude that there is a genuine issue of material fact regarding whether, under the 1998 Agreement, Pulte agreed to assume the defense of the Grayhavens in the underlying action. The essential elements of a contract are: (1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement, and (5) mutuality of obligation. *Hess v Cannon Twp.*, 265 Mich App 582, 592; 696 NW2d 742 (2005). Though if we were jurors in this case we may well agree with the Grayhavens on this issue, our function is much different. In applying de novo review, we conclude that this is a classic case of conflicting evidence regarding what was agreed upon by two competent parties. Accordingly, summary disposition under MCR 2.116(C)(10) was not appropriate on this record.

Specifically, the record evidence submitted below by the Grayhavens, which includes Brown's purported affidavit[3], as well as the conduct of the parties, supports the position advocated by the Grayhavens. First, Brown's purported affidavit shows that Pulte offered to pay Grayhavens' legal fees in connection with defending against plaintiffs' action, and that this offer was accepted by the Grayhavens.

Second, proof of the existence of an implied contract can also be established by means of the parties conduct. *Macomb County Taxpayers Ass'n v L'Anse Creuse Pub Schools*, 455 Mich 1, 11; 564 NW2d 457 (1997). Here, the record establishes that Pulte did, in fact, assume the defense of the Grayhavens in the underlying matter. The record shows that, after this Court remanded the previous matter to the circuit court, attorney Stephen Wasinger, who was retained on behalf of both Pulte and the Grayhavens, filed an answer to plaintiffs' third amended complaint. Furthermore, the record at the October 30, 2003, hearing contains an assertion by Wasinger that Pulte agreed to defend the Grayhavens. Wasinger stated as follows:

> I think its fair to say that Mr. Brown is right about one thing. I was invited into this case at a time that Mr. Brown had separate counsel. And Pulte asked me to represent both Mr. Brown and Pulte, with the understanding that Pulte would pay. So I believe there is an agreement and if they want to make a new agreement, that's their business.[4]

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[3] During oral argument before this Court, and through the parties' post-argument submissions, it became evident that the "affidavit" signed by Brown was not notarized. It was therefore not properly considered an affidavit, see *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 711; 620 NW2d 319 (2000), and thus it's use as an affidavit in support of a motion filed under MCR 2.116(C)(10) was questionable. See MCR 2.116(G)(6).

[4] This statement by Wasinger does not rise to the level of a judicial admission that a contract existed between the parties. For one, it lacks the solemnity required by our cases. *Gojcaj v Moser*, 140 Mich App 828, 833-834; 366 NW2d 54 (1985).

Accordingly, based on the evidence submitted by the Grayhavens, a reasonable person could easily conclude that Pulte agreed to defend the Grayhavens in the underlying action.

Nelson's affidavit, however, could support the opposite conclusion.[5] The properly sworn affidavit disputes any explicit agreement between the parties regarding Pulte indemnifying or defending the Grayhavens. However, it does not in any manner address the fact that Pulte *was since 1998* paying for the attorney representing both itself and the Grayhavens. Additionally, although Nelson admits that the parties agreed to have one attorney represent them all, his reason (convenience of the parties) is different than that explained by the Grayhavens (Pulte assumed the defense of the Grayhavens). Consequently, based on all the admissible evidence submitted at the time of the trial court decision, reasonable jurors could conclude either way on this issue. It was therefore improper for the trial court to grant the motion for summary disposition, as there were genuine issues of material fact regarding what the parties agreed to in 1998. *Linsell v Applied Handling, Inc.*, 266 Mich App 1, 12; 697 NW2d 913 (2005); *Maiden, supra*.[6] As a result of these conclusions, we need not address Pulte's argument that, even if the 1998 Agreement exists, it is barred by the merger clause contained in the 2001 Agreement and that parol evidence is inadmissible to prove the existence of the 1998 Agreement.

Pulte also argues that, assuming the existence of the 1998 contract, the Grayhavens would not be entitled to attorney fees for prosecution of the cross-claim. We need not address this issue, as we already must remand this case to determine whether a 1998 agreement existed, and its scope. Any further discussion on our part would merely be dictum.

The trial court's order is vacated, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray

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[5] Both Nelson's affidavit and Brown's purported affidavit are quite conclusary. Brown's contains little specificity regarding the full terms of the contract, while Nelson's simply denies the existence of any agreement.

[6] Assuming the existence of the 1998 agreement, we disagree with Pulte's contention that there was no consideration for the 1998 agreement. Consideration is defined as "a benefit on one side, or a detriment suffered, or a service done on the other." *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002). But, only the existence of consideration is necessary, for "courts do not generally inquire into the sufficiency of consideration," so as a consequence even "[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration." *General Motors, supra* at 239, citing *Harris v Bond & Mtg Corp*, 329 Mich 136, 145; 45 NW2d 5 (1950) and *Whitney v Stearns*, 16 Maine 394 (Sup Judicial Ct Maine, Waldo Co, 1839). In return for receiving the benefit of indemnity, the Grayhavens relinquished their choice of counsel and conferred to Pulte the benefit of having its counsel represent all of the defendants.